

REVIEW



The Law of Tort in Hong Kong by DK Srivastava and A D Tennecone [Hong Kong: Butterworths, 1995. lii + 488 pp, paperback, HK\$900]

This publication represents the first serious attempt at a comprehensive, analytical presentation of tort law in Hong Kong. The only previous work of significance, Robyn Martin's *Law of Tort in Hong Kong* (Hong Kong: China and Hong Kong Law Studies, 1987) does not qualify, and was not appropriate for university teaching, as consisting mainly of potted summaries of a limited selection of cases with only a general treatment of the major tort actions. This book, by contrast, attempts to cover the full range of tort law subject-matter in detail, in a textbook format, and so stands quite apart from its predecessors. As a pioneering effort it is to be welcomed, but, regrettably, is unable to avoid many of the hazards often encountered when attempting a foray into new territory.

The general feel and tone of the book are very much like those of the traditional, standard tort law textbook with which all lawyers and law students are familiar. The material is organised and presented according to the breakdown typically found in such standard works, with the various parts and chapters marked off according to established tort actions, eschewing the 'interests' or 'purpose'-based approach recently in vogue and still favoured by writers such as Keith Stanton (see Stanton, *The Modern Law of Tort* (London: Sweet & Maxwell, 1994)). As well, the authors have for the most part stayed away from current trends in tort theory and criticism, such as one finds in the accident compensation approach taken with considerable success in a work such as Peter Cane's *Atiyah's Accidents, Compensation and the Law* (London: Butterworths, 5th ed 1993) or, more controversially, in the US-based law and economics approach, which has a growing appeal there and elsewhere for tort law applications in particular.

Moreover, it is the view of the authors, lecturers at the City University of Hong Kong, that the tort law of Hong Kong is essentially the same as that of England. No attempt is made to put forward a thesis of a 'Hong Kong tort law,' the authors conceding that the basic principles 'are still for the most part to be found in English case law' (p 31). This being so, the justification for a comprehensive work is at the outset placed in some doubt, as there are currently a number of excellent textbooks on English tort law readily available at less than half the price of this volume.

As to be expected from a comprehensive work, the early chapters are devoted to general matters, including definitions and history, before proceeding to an examination of the specific tort actions. The book begins with a consideration of the meaning of tort, its English history, including an elaborate explanation of the reception of English law in Hong Kong, and a comparison with liability under other compensation regimes currently in use in Hong Kong.

Some observations should be made here, and these have to do with priorities in a work of this nature. The history of tort law, including its origins in the forms of action, is an oft-told tale to which little insight is added here, certainly not by the liberal but unnecessary use of Latin archaisms. Similar objections can be raised regarding the inclusion of an entire chapter on the reception of English law (ch 3). The position in tort is no different than in the general law of Hong Kong, and issues relating to reception have been treated extensively and well in the textbooks on constitutional law and the legal system written by Professor Peter Wesley-Smith. These would be small objections hardly worth noting except that, when the authors come to the important and peculiarly Hong Kong issue of the legislative mechanisms for accident compensation in Hong Kong (ch 2), which, in the case of the workers' compensation systems, is clearly the most used mechanism giving rise to the largest body of litigation in Hong Kong, a comparatively short ten pages are all that are devoted. The authors might justify this on the basis that it is not 'tort law' in the strict or technical sense, but that would be to unduly limit the usefulness of what aspires to be a comprehensive work on Hong Kong tort law, and in any case fails to recognise modern realities, in particular that the common law accounts for only a part of our tort law.

The book then moves to a consideration of the so-called intentional torts (chs 4–10). First, the authors attempt a theoretical analysis of the distinction between intention in tort law and that in criminal law, and encounter some difficulty. Indeed it is in the few forays into theoretical areas where the authors get into the most trouble in this book.

Regarding the criminal law, contrary to the authors' view, a 'desire to bring about a consequence' (p 43) is not a requirement for intention after the decisions in *R v Mohan* [1976] QB 1, *R v Moloney* [1985] AC 905, and *R v Nedrick* [1986] 3 All ER 1. As well, contrary to the position taken by the authors (p 43), if A kicks B in the stomach, and B suffers more serious harm than expected due to some unknown vulnerability, A is liable for having caused the more serious harm (see *DPP v Parmenter* [1992] 1 AC 699 interpreting the English equivalent of s 19 of the Offences Against the Persons Ordinance).

Regarding tort law, the concept of intention in trespass cannot be explained on the basis of the exceptional situation of trespass to land, which is the example used by the authors (p 43). In the torts of trespass to the person (battery, assault, false imprisonment) it must be shown that the defendant desired a particular consequence (eg in battery, unwanted physical contact). It is not sufficient to show that 'if the act which produces the harm is done deliberately, the defendant is liable for the harm caused' (p 43). For instance, if, in pushing open a door to enter a room, A inadvertently hits B who is unexpectedly standing on the other side, A does not have sufficient intention for the tort of battery, however deliberate his conduct in pushing open the door.

This is so unless one takes the view that trespass can be committed negligently (a view discredited in *Letang v Cooper* [1965] 1 QB 232, and not applied since then), in which case one is not talking about intention but negligence.

Further, it is fundamentally and conceptually wrong to explain negligence as a 'state of mind' (p 44). Far from that, it is a standard of conduct, and is proved without reference to the defendant's mental state. This is succinctly demonstrated in the well-known case of *Nettleship v Weston* [1971] 2 QB 691, where the learner driver, doing her level best to drive carefully, was still held liable for the damages caused by her substandard driving.

Finally, regarding intention, the authors state that the concept of 'transferred intent,' well known to the criminal law (there called 'transferred malice'), 'has not been adopted by the English judges' (p 59). No attempt is made to explain why this is so, or whether it is right that this is so. No mention is made of two well-known authorities which apply the concept of transferred intent to trespass, *James v Campbell* (1832) 5 Car & P 372, and *Livingstone v Ministry of Defence* [1984] NI 356. Moreover, if the authors' position were correct, then the law would be deficient. When A aims a blow at B but misses and hits C, liability in trespass should attach, just as it would in the criminal law. It is no answer, as suggested by the authors, that the tort of negligence would provide a remedy. If the defendant is engaging in aggressive, criminal conduct, and an unintended victim is injured, this is hardly the province of negligence (what then is the standard of care to be applied, that of 'the reasonable murderer'?). At any rate, *Livingstone* itself shows the limitations of the negligence action in this context. There, the plaintiff failed in negligence but succeeded in trespass, with the application of the principle of transferred intent.

Other important authorities are conspicuously absent in the treatment of the intentional torts. In the section entitled 'Damages for Assault and Battery and False Imprisonment' (p 63), no reference is made to the rule about remoteness. This is a controversial issue considering the conflicting judicial statements from various jurisdictions as to whether the rule is one of foreseeability (as in negligence) or of directness. This is a particularly hot question in Hong Kong, where the recent adoption of a directness rule in the High Court decision of *Wong Kwai-fun v Li Fung* (1994) HCA No 5810 of 1986 is in conflict with the High Court's adoption of a foreseeability rule in *Yeung For-kan v AG* (1981) HCA No 1254 of 1978. The question is not a trivial one, concealing as it does the important policy issue of whether or not one who engages in aggressive conduct (which trespassory conduct is by definition) should be made liable for all of the harm caused, even if unforeseeable.

The tort of trespass to land (ch 8) is quite thoroughly treated, but when examining the subtopic of trespass to airspace (p 78) the authors fail to make the important distinction brought to light in *Anchor Brewhouse Developments*

v Berkley House (Docklands) Development Ltd [1987] BLR 82, between transgressions of a transient nature, such as occurred by aircraft invasion in *Bernstein v Skyview* [1978] 1 QB 479, and invasions from a fixed structure, such as occurred by a protruding sign in *Kelsen v Imperial Tobacco Co Ltd* [1957] 2 QB 334, and by an overhanging crane in the *Anchor Brewhouse* case itself. Only in the latter circumstance can the possessor claim an unlimited right to the airspace above the land. This is a critical distinction, were it to be applied to Hong Kong, where space is limited and trespass-free construction a virtual impossibility. It is to be hoped that such a rule would be deemed to be not 'applicable to the circumstances of Hong Kong or its inhabitants' under s 3(1) of the Application of English Law Ordinance.

Finally, before leaving the topic of intentional torts, it is to be noted that there is no treatment of the tort of malicious prosecution, or, in its wider formulation, abuse of judicial process. This would not normally be a significant omission but again, the question is one of priorities, given a work of this breadth. Considerable attention is devoted to history, reception, and to obscure tort actions such as detainee, and liability for animals (which is surely not a major concern in Hong Kong), and, eventually, to the economic torts, on which there is virtually no authority in Hong Kong. It is unclear why there is not at least some mention of the tort of malicious prosecution, involving as it does the abuse of the person through the judicial process. The law in Hong Kong was ably set out by Judge Yang in *Kowloon Dairy v Ku Yuk-shing* DCA No 1872 of 1968, and should have been accounted for here.

The section on the tort of negligence (chs 11-14) appropriately attracts the authors' greatest attention. This section reads well and is relatively comprehensive. The evolution from the 'two-stage test' of *Anns v Merton* [1978] AC 728 to the 'incremental and by analogy' approach of *Caparo v Dickman* [1990] 1 All ER 568 is plotted. Unfortunately, there are also some important omissions here which require some comment.

In the context of duty of care and pure economic loss, no mention is made of the important decision of Deputy High Court Judge Findlay QC in *Surface International Ltd v Meco Engineering Ltd* [1990] 2 HKLR 193, in which the overruling in *Murphy v Brentwood* [1990] 2 All ER 908 of the *Anns v Merton* 'imminent harm' doctrine was anticipated. This case indicated the judicial position in Hong Kong that defective construction of a house would be considered a pure economic loss, choosing not to follow the rule in *Anns v Merton*.

Still on the subject of pure economic loss, there is no mention of two landmark House of Lords decisions from 1994, both of which overhauled the principle laid down in *Hedley Byrne v Heller* [1964] AC 465. In *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506, a duty of care was found to be owed by investment fund syndicates' managers and agents to individual members of

the syndicates (investors). The facts of the case involved the provision of financial services rather than the typical *Hedley Byrne* requirement of the giving of advice or making of a statement, and therefore involved an extension of the duty of care. The outcome was all the more remarkable given that even those plaintiffs in privity with the defendants were found to be owed a duty, an apparent contradiction of Lord Scarman's famous dictum in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 regarding concurrent liability in tort and contract.

The slightly earlier House of Lords decision in *Spring v Guardian Assurance* [1994] 3 All ER 129 also receives no mention by the authors. Here, in the context of a job reference written by the plaintiff's former employer (the defendant), a duty of care was imposed. Again, the provision of services (as opposed to the making of a statement) was found to come within the *Hedley Byrne* rule, and further, the 'special skill' requirement from *Hedley Byrne* was held to embrace the concept of special 'knowledge' (in this case, the former employers' knowledge of the plaintiff qua employee). It can only be assumed that publishers' timetables prevented the authors from including a consideration of these important decisions, rendered a full year prior to June 30 1995, when the authors dated their preface. This must certainly be the explanation for the failure to mention the February 1995 landmark decision in *White v Jones* [1995] 1 All ER 691, in which the House of Lords extended the *Hedley Byrne* principle yet again in imposing a duty of care on solicitors to beneficiaries in the preparation of a testamentary disposition.

Finally, on the subject of duty of care, there is no mention of the controversial issue of concurrent liability in tort and contract. This is an important issue with practical implications for plaintiffs, and has been the subject of contradictory decisions at all judicial levels, including the Privy Council in the Hong Kong case of *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80. This issue was recently the subject of consideration, either directly or implicitly, in each of the *Henderson*, *Spring* and *White* decisions referred to above, and has now been resolved in favour of a general concurrency rule.

On the topic of defences to negligence, contributory negligence is thoroughly treated, and appropriate Hong Kong case law is cited by the authors. Strangely, there is no mention of the defence of *ex turpi causa*, otherwise known as illegality, an important policy-based defence that regularly crops up in the cases (eg see *Wong Ting v Yuen Hing-kwan* [1979] HKLR 396, and *Mak Yuk-kiu v Tin Shing Auto Radio CTR Ltd* [1981] HKLR 77). This defence was recently and thoroughly aired by the English Court of Appeal in the case of *Pitts v Hunt* [1990] 3 All ER 344. It was also the subject of special consideration in *Yim Tat-fai v AG* [1986] HKLR 873, where the defence was successful even though the plaintiff's conduct (attempted suicide while in police custody) was not illegal per se. The defence was allowed because public policy prevented the

plaintiff from succeeding. Moreover, the plaintiff's conduct violated ecclesiastical law, held by the court to have been imported into Hong Kong as part of the general common law.

The failure to refer to *Pitts v Hunt* is astonishing for another reason. That case ruled that the defence of *volenti non fit injurium* would not be available to a driver of a car relying on a passenger's apparent consent to risks. The case involved the interpretation of the equivalent provision of s 12 of the Motor Vehicles Insurance (Third Party Risks) Ordinance, and held that on a true interpretation, the provision prohibited not only express agreements purporting to restrict the driver's liability to passengers, but the more common implied agreements (*volenti*) as well. There is no mention of this important provision anywhere in the book.

Before leaving the topic of omissions, it is odd that in a general work on tort law there is no section on the principles relating to the assessment of personal injury damages. This would also have involved a consideration of death, and the provisions creating dependency claims in the Fatal Accidents Ordinance, as well as the survival of actions provisions in the Law Amendment and Reform (Consolidation) Ordinance. This omission is truly to be regretted because actions for tortiously-caused death are commonplace in Hong Kong. As well, under both regimes the legislation and hence the case law differ in material respects from that in England, in particular as regards the matter of the estate's claim for 'lost years.' In Hong Kong, but not in England, such a claim is still permissible.

There are other problems with this book, some of which suggest a lack of attention to detail, which in fairness to the authors may have resulted from publishers' deadlines. There is often a failure to provide sources, or to follow these sources up properly, as indicated by the following examples. The opening sentence in chapter 2, claiming that, on average, 20,000 people are killed or injured yearly on Hong Kong's roads, does not make reference to a source. In the same paragraph, regarding statistics about the rate of accidents in the workplace, the authors refer to a secondary source (a textbook) when the primary source (the Hong Kong Monthly Digest) was readily available. On p 87, a quote from *Bramwell B* is not documented in any way, with not even an indication as to whether the source is a judicial decision or some other writing. And on p 379, no citation or reference of any sort is provided for the summary of the trial decision in the libel action brought by Professor Cheung of the University of Hong Kong against *Eastweek Magazine*. These examples of inattention were found after a quick reading and, somewhat worryingly, may not be exhaustive.

Of greater concern is a sometimes too casual interpretation of the legal text under consideration. For instance, when the authors attempt to paraphrase the Employees' Compensation Ordinance provision regarding the circumstances

in which a worker will be disentitled to compensation under the scheme, the provision (s 5(1)(b)) is misinterpreted and/or misrepresented (p 21). The conferring of a discretion on the court to allow a claim in the event of a serious incapacity or death applies not only to the case where the employee has deliberately aggravated the injury, but *also* to the case where the injury is attributable to the employee's serious and wilful misconduct. This much is clear from a plain reading of s 5(1)(b).

A similar casualness can be detected in respect of the interpretation of the cases concerned with the issue of 'course of employment' in a common law negligence action brought by a worker against his employer (pp 276-7). The authors cite and discuss two cases in this context, *Fong Fung-ying v AG* (1984) Civ App No 111 of 1984, and *Wang Gun-fook v McLean* [1973] DCLR 75, but these were in fact cases interpreting the Employees' Compensation Ordinance s 5(1) requirement that the accident arise 'out of and in the course of the employment.' This phrase has been the subject of careful consideration in a line of cases specific to the purposes and thrust of the Employees' Compensation Ordinance, including the *Fong* and *Wang* cases (see generally R Martin, 'Employees' Compensation: "Arising out of and in the Course of Employment"' (1986) 16 HKLJ 71). The authors make no reference to the fact that these cases were concerned with the interpretation of specific legislative provisions, and no argument is put forward to justify the widening of the application of these cases to the common law of employers' negligence.

A further concern of a general nature is the book's treatment (or lack thereof) of Hong Kong case law. From a perusal of the table of cases it can soon be discerned that fewer than 10 per cent of the cases cited are from Hong Kong. Indeed there are extensive sections, entire chapters, where no Hong Kong authorities are cited at all, let alone considered, giving the book a distinctly English feel. This may be forgivable in those areas where there are few or no useful Hong Kong authorities, as for instance in the area of liability for animals, or the economic torts (although one might question why these topics feature at all if there is an absence of local authority and therefore, one might presume, only a limited practical relevance). But even in the main areas of treatment in this book, there can be no doubt that Hong Kong case law is for the most part mentioned only anecdotally, or by way of footnote, and does not take its proper place of prominence in a work that after all is meant to be a comprehensive treatment of Hong Kong case law.

This English feel is exacerbated by the merely scant references to academic writing on Hong Kong tort law. A glance through the volumes of the Hong Kong Law Journal or the Law Lectures for Practitioners series from the last decade or so reveals dozens of articles and notes comprising a not inconsiderable body of academic literature on Hong Kong tort law, yet these go largely unnoted. The authors' failure to avail themselves of these sources is particularly

regrettable because most of the locally published literature is concerned with peculiarly Hong Kong aspects of the law, and much valuable insight on truly 'local' law is lost as a result.

A final concern of a general nature which must be expressed is that the book was unacceptably out of date at the time of publication. Not only is there no treatment or even mention of leading House of Lords authorities from 1994, there is also a failure to identify and discuss important legislative developments in Hong Kong in the year preceding publication. For instance, there is no mention of the 1994 amendments to the Employees' Compensation Ordinance, which widened the ambit of 'course of employment' and therefore of the field of persons brought within the protection of the ordinance (see eg Ordinance No 75 of 1994, in effect July 1994; and Ordinance No 1 of 1995, in effect 1 February 1995). Moreover the long-awaited Occupational Deafness (Compensation) Ordinance (No 21 of 1995) was finally passed into law in April of 1995, creating for the first time in Hong Kong a compensation regime for occupational deafness. Even with publishers' deadlines, such an important piece of legislation required discussion and analysis at least in its Bill form.

In fairness to the authors, a comprehensive work on the tort law of Hong Kong is no mean undertaking, and they are to be commended for the ambition and magnitude of their attempt. The strengths of this book are in its breadth of coverage, and in its easy-to-read and succinct style of writing.

However, the main challenge in such a project is the development of a theory of Hong Kong tort law that justifies the writing and publication of such a work. Otherwise, the end product, however comprehensive, adds little to the existing body of knowledge and risks becoming little more than a facsimile of the generic English tort law textbook, with which the market is already flooded. For this reason, and despite the pioneering effort of its authors, *The Law of Tort in Hong Kong* falls short of justifying its publication. It is to be hoped that this deficiency can be addressed in subsequent editions of this work.

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Sentencing in Hong Kong by I Grenville Cross QC and Patrick W S Cheung [Hong Kong: Butterworths, 1994. xxxii + 128 pp, hardback, \$575]

Sentencing is no longer an art. Solicitors, counsel, and judiciary engaged in the sentencing process need easy access to relevant principles of sentencing law and practice. According to this book's back cover, it is designed to be of particular value to all such persons.

The best things about this book are that it is much needed and provides comprehensive reference to just about all Hong Kong cases relating to sentenc-